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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 318

ELMER LYSEFJORD and WALTER R. WALDRON, doing business as aabeta co.,

Petitioners.

vs.

THE FLINTKOTE COMPANY, a corporation,

Respondent.

Reply to Brief of Respondent in Opposition to Petition for Certiorari.

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Reply to Brief of Respondent in Opposition to Petition for Certiorari.

We do not pause to reply to respondent's argument regarding alleged formal defects in the Petition; nor do we reply to respondent's criticism of the questions presented except to state the obvious that convenience and clarity of presentation indicated the desirability of placing the "Statement" ahead of the "Questions Presented."

Respondent's so-called Statement of the Case neither adds nor detracts from the statement in the Petition for Certiorari, except to add and embellish certain irrelevancies. In this latter connection this Court will readily formulate its opinion from a reading of the Petition for Certiorari herein as to what questions are presented in this proceeding.

Reply to Respondent's Argument.

Purported "Hearsay" Statements of Ragland.

The Petition for Certiorari[1] (pp. 3-6, 18-25, App. B) challenges the correctness of the hearsay holding of the Circuit Court of Appeals, as well as the correctness of that Court's holding that Ragland's statement was in any wise prejudicial or that any alleged error in regard thereto was not waived. In this connection this Court's attention is called to the fact (apparently not denied by respondent) that Ragland's so-called "hearsay" admission was not only repeated in substance throughout Flintkote's defense by Flintkote's own witnesses, but the substance of said admission was repeatedly stated to the jury by defense counsel. Respondent makes no attempt to deny the foregoing facts nor does respondent expressly deny the mere cumulative nature of Ragland's admission. It seeks rather to divert attention from these undisputed facts by suggesting *first* that Ragland and other defense witnesses limited their defense testimony to a categorical denial of a single "joint" meeting *at the Flintkote offices*, and second, that the admission of Ragland was prejudicial and not merely cumulative since the latter admission referred to "a joint meeting among representatives of Flintkote and various contractors approved by Flintkote at the *Flintkote offices*." (Opp. p. 14.)[2] It is clear that defense evidence was not so limited and went further to show not one joint meeting among said parties, but *numerous joint meetings* between Flintkote officials and the same competing contractors at places other than at the

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[1]The Petition for Certiorari will hereinafter be referred to as Pet.; respondent's Brief in Opposition to Petition for Certiorari will hereinafter be referred to as Opp.

[2]It is to be noted that Lysfjord's testimony on this admission of Ragland as well as the same testimony of Waldron [Rep. 262-263, 270, 474-480] does not warrant the assumption made here that the meeting was joint among all petitioners' competitors held at the Flintkote offices. (Pet. pp. 4-6.)

Flintkote offices and by telephone for the same purpose and with the same effect, namely to induce Flintkote to stop petitioners' competition. The superficial and untenable nature of respondent's position is apparent. Petitioners have hereinbefore shown and demonstrated (Pet. pp. 4-6, App. B) that the testimony of defendant's own witnesses and the admissions of defendant's own counsel shows without dispute: (1) that competitors of petitioners telephoned their strenuous objections to petitioners' competition to Flintkote officials; (2) that said competitors demanded that Flintkote do something immediately to stop petitioners' competition; (3) that instead of the competing contractors coming personally to the offices of Flintkote, Flintkote's top officials met in repeated *joint* meetings with petitioners' competitors at the latter's places of business and elsewhere. Thus, immediately after Lewis of Flintkote received the telephonic demands of petitioners' competitors to immediately do something about petitioners' competition Baymiller and Heller of Flintkote discussed petitioners' competition and their competitors' complaints and demands to put a stop to such competition, first with the defendants, Newport and Krause, at the latter's offices, then with the defendants, Hoppe and Howard, at Hoppe's place of business; (4) at about the same time Harkins (the principal officer of Flintkote) called the defendant Newport and conferred with him along the same lines, at the Brown Derby Restaurant in Los Angeles; (5) Ragland of Flintkote was later dispatched to cover the same ground—he conferred with Newport and Krause, with Hoppe and with Howard, concerning these contractors' demands that Flintkote do something about the competition being offered by petitioners; (6) Krause, Howard, Hoppe, Lewis, Heller, Ragland, Thompson, Harkins, and other defense witnesses all testified concerning the numerous *joint* meetings and telephonic conferences among themselves for the admitted purpose of having Flintkote do something about the com-

petition of petitioners in the acoustical tile field; (7) this evidence is set forth and referred to in the Petition for Certiorari and the gist of the totality of Ragland's admissions was stated and admitted by Flintkote's chief counsel throughout the trial. [Pet. pp. 4-6, App. B; R. 1042, 1050, 1064, 1065, 1090, 1091, 1092, 1100, 1101, 1109-1112, 1123-1126, 1139, 1142-1143, 1145-1146, 1152, 1157-1158.] Therefore, Ragland's admission viewed dispassionately amounted to nothing more or less than that there were strenuous objections to petitioners' competition—an undisputed and admitted fact. Nor did this admission go to the crucial question presented to the jury; namely, whether or not Flintkote knowingly and purposefully joined and aided the conspiracy to eliminate petitioners' competition. It is clear that Ragland's so-called "hearsay" admission was merely non-conclusive and cumulative. This is especially true since petitioners' testimony concerning such admission was placed briefly before the jury at the commencement of the trial and the admissions of defense counsel and defense evidence covered a period of many days later on during the trial. Finally, respondent does not deny that Ragland's admission was admitted subject to a motion to strike and was repeated by both Lysfjord and Waldron. That respondent's Motion to Strike was merely perfunctory is demonstrated [Pet. p. 5, R. 1214-1215] by the admitted fact that the Motion was limited to Lysfjord's testimony and ignored the same testimony by Waldron.

There is nothing in this portion of respondent's Brief (pp. 11-16) which in any wise denies or rebuts the law, evidence, or conclusions contained in the Petition for Certiorari.

It is respectfully submitted that the decision of the Ninth Circuit Court of Appeals is in direct conflict with the following holdings in addition to those previously cited and therefore amounts to an erroneous and dis-

criminatory application of the law to treble damage actions contrary to the public policy of the Act.

Objection to competency of evidence is lost if the objecting party himself offers testimony on the same subject matter as evidence. Under these circumstances it cannot be said that any alleged error concerning the original evidence is prejudicial. *U. S. v. Graber*, 123 F. 2d 307 (C. C. A. 2d); *Trouser Corporation of America v. Goodman & Theise, Inc.*, 153 F. 2d 284 (C. C. A. 3d.) *Mitchell v. Toole* (C. C. A., 5th), 287 Fed. 25, holding that "But if appellee's wife was not a competent witness, because of interest, prejudicial error is not shown, since testimony to the same effect as hers was given without objection by several other witnesses." *Equitable Surety Co. v. National Capital Bank* (C. C. A., D. C.), 278 Fed. 1002, 1005, holding that the substance of the objectionable testimony "had been brought to the attention of the Court through the cross-examination of Mr. Hurley, so that appellant could not have been prejudiced." *Lucks v. United States* (C. C. A., 5th), 100 F. 2d 908, holding that "* * * Furthermore, the testimony was cumulative and its admission did not affect the substantial rights of appellant. Therefore, the error, if any, may be disregarded, 28 U. S. C. A. Sec. 391." *United States v. Spadafora* (C. C. A., 7th), 181 F. 2d 957, holding that "Errors in criminal case may be disregarded in the face of overwhelming evidence properly received of the defendant's guilt. *Kotteakos, et al. v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557." (In the instant case it seems clear that the Ninth Circuit Court of Appeals has placed a greater burden of proof upon a plaintiff in an antitrust treble damage action than is required of the Government in a criminal case.)

International Indemnity Co. v. Lehman (C. C. A., 7th), 28 F. 2d 1, holding that the inadmissible testimony in that case was merely cumulative and tended only to confirm the conclusion which the other testimony in the case estab-

lished and was, therefore, not prejudicial. *Beach v. United States* (C. C. A., 8th), 19 F. 2d 739, holding that "* * * When Cuff's affidavit was offered, he had not testified; but he subsequently testified substantially to the same facts which were stated in his affidavit, and, if we concede that the admission of these affidavits was erroneous, they were not in our opinion prejudicial to the defendant, because all the substantial statements in them were testified to at the trial by those who made the affidavits, so that in our opinion no prejudicial error resulted to the defendant by their reception." *United States v. Goldsmith* (C. C. A., 2d), 91 F. 2d 983, 986 holding "* * * That this was pure hearsay as to the appellants cannot be denied, for there was nothing which brought it within the rule that statements made by one conspirator in furtherance of the conspiracy bind all. * * * Yet we are not bound to reverse a conviction so clearly supported as this is by competent evidence to show the appellants guilty beyond a reasonable doubt because a bit of cumulative evidence was erroneously admitted. On the contrary, we are bound not to, since the substantial rights of the parties were not affected. Jud. Code, s. 269, 28 U. S. C. A. Sec. 391; *United States v. Buchalter*[3] (C. C. A.), 88 F. 2d 625." *Hays v. Stine* (C. C. A., 4th), 229 Fed. 289, holding that "* * * The statement of Stine that the sale was for joint account, not made in Hays' presence, would, of course, not bind Hays, and perhaps had better have been excluded; but in view of other similar evidence, and the inferences properly deductible from the admitted facts, which in this case we think speak louder than words, the error was harmless." Compare *Sacramento Suburban Fruit Lands Co. v. Loucks* (C. C. A., 9th), 36 F. 2d 921. *Kottcakos v. United States*, 66 S. Ct. 1239, 328 U. S. 750, where this Court held "The Government's evidence may be summarized briefly, for

[3] *Buchalter, supra*, was a Third Circuit Decision.

the petitioners have not contended that it was insufficient, if considered apart from the alleged errors relating to the proof * * *."[4] "Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus, it is not the appellate court's function to determine guilt or innocence. *Weiler v. United States, supra*, 323 U. S. at page 611, 65 S. Ct. at page 551; *Bollenbach v. United States*, 326 U. S. 607, 613, 614, 66 S. Ct. 402, 405, 406. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error.[18] *Weiler v. United States supra.*"

"[18]This of course presents a question of law. And when the error relates to that minimum so that, if eliminated, the proof would not be sufficient, necessarily the prejudice is substantial. *Cf. Tot v. United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519."

In *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, this Court recognized and affirmed the universal rule in *Kotteakos* above by stating that "* * * *Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* (Emphasis added.) But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. * * * In

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[4]Neither is there any such express denial here.

view of the foregoing disposition of the case, it is unnecessary to decide whether the alleged hearsay testimony was admissible under the *res gestae* rule. Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge. * * * *But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony we need not determine whether that discretion was abused in this instance.*" (Emphasis added.)

See also: *Franklin v. United States*, 193 Fed. 334, and Jones Commentaries on Evidence, 2d Edition, 1924, Sec. 2524. *McCandless v. United States*, 298 U. S. 342 (holding that under Section 269, Judicial Code, 28 U. S. C. Sec. 391, even an erroneous ruling "which relates to substantial rights of a party" is not ground for reversal if (as here) it affirmatively appears from the record that it was not prejudicial) *Myers v. Reading Co.*, 331 U. S. 447, 67 S. Ct. 1344, which followed the *Lavender* case *supra*; *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 67 S. Ct. 598; *United States v. Burke* (9th C. C. A.), 50 F. 2d 653, 656; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 329, 64 S. Ct. 409.

By way of final illustration of the contradiction in the Ninth Circuit Court of Appeals' holding in the instant case and in their attitude and holdings in Antitrust criminal cases this Court's attention is directed to *C-O Two Fire Equipment Co. v. U. S.* (9th C. C. A.), 197 F. 2d 489.

Relevancy of Circuit Court of Appeals' Comment and Holding on Instructions Other Than Those Pertaining to Damages.

Respondent (Opp. p. 8) points out to this Court that the Circuit Court of Appeals for the Ninth Circuit did not apparently predicate its ruling in the instant case upon its discussion of "alleged errors in instructions, other than damages." Whether or not this is so depends upon the general tenor of the entire decision. Had the Circuit

Court's ruling been unaffected by its discussion of this point it is most difficult to see any purpose in the discussion of that court. One of the purposes of petitioners in calling this Court's attention to that part of the decision was to point out an additional distortion and perversion of the Federal Rules of Civil Procedure and the law by the Ninth Circuit Court of Appeals in bolstering its opinion in this—a treble damage action under the Anti-trust Acts, as distinguished from its contrary position and consideration of the same rules in cases not involving treble damage actions. In other words, as pointed out in the Petition for Certiorari to show the hypercritical attitude of the Ninth Circuit Court of Appeals in this type of action as compared to its application of the same rules in other types of actions (Pet. pp. 9-11). The importance of the discussion of the Circuit Court in this part of its decision if applied only to treble damage litigation cannot be doubted.

Reply to Respondent's Arguments on Damages.

Respondent (Opp. pp. 16-19) admits:

(1) That plaintiffs can recover for damage occasioned by wrongful acts committed prior to the filing of the action even though the damage continues thereafter and necessarily that there were no *actual* affirmative overt acts of Flintkote causing damage to petitioners' business subsequent to the act of termination on or about February 19, 1952; that is, in the absence of the erroneous implication indulged in by the Circuit Court of Appeals;

(2) That the Circuit Court of Appeals' ruling was based upon that Court's own conclusion that "Flintkote's conduct in refusing to deal with plaintiffs was *by law* converted into a continuing series of *implied in-law* refusals to deal." The evidence to the contrary notwithstanding, and

(3) That *if* the ruling of the Circuit Court of Appeals in making such an implication without benefit of evidence, and admittedly contrary to all of the evidence and admissions of defense counsel during the trial, was wrong "so was the ruling."

It is to be noted that respondent does not deny either the utter lack of evidence to sustain the Circuit Court of Appeals' holding, nor does it deny the admissions of defense counsel and all of the evidence to the contrary. This Court was referred to such evidence (Pet. pp. 11-18, App. C and D, pp. 82-92), but for convenience record-references are repeated here [R., 239-240, 257-258, 487, 713-714, 782, 789, 829, 826, 830, 854, 856, 859, 860, 871, 953-955, 964, 980-981 993, 995 999, 1057, 1071, 1072, 1096. That the Court was "wrong" is clear, both from the evidence, and in accordance with the very cases upon which the decision relies. The Circuit Court of Appeals' erroneous ruling of implied-in-law contingent and repeated refusals to sell was based primarily upon a misconstruction of the law as applied to the *facts* in this case, and even more directly upon a misinterpretation of the decision of the Second Circuit Court of Appeals in the case of *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F. 2d 79 [R. 1314]. In this latter case, like all of the cases cited in the Petition for Certiorari, the Court recognizes that damages which accrue after the suit is brought can be recovered in the action *if they are the result of acts done before the suit was filed.* It will be and has been pointed out herein that there was only one single and final overt act causing damage to the plaintiffs herein irrespective of the continuance of the conspiracy to monopolize, to fix prices, to exclude competition, and to allocate business. The other similar case relied upon by the Circuit Court of Appeals to sustain its decision herein was *Frey & Son v. Cudahy Packing Co.*, 243 Fed. Rep. 295, which concerned the same type of facts on this point as were involved in *Frank-*

fort, supra. In both said cases the Court did not *imply* contingent or repeated refusal to sell contrary to the facts in each said case, since *the evidence* in both *Frey* and *Frankfort* showed without dispute that the refusal to deal *was in fact* contingent upon day to day compliance with the price fixing scheme in each case, and that compliance by the plaintiff would have resulted in a reinstatement of the plaintiffs' source of supply. It will be noted here that neither respondent nor the Circuit Court of Appeals in the instant case has or could cite a decision sustaining an appellate court's power to imply, *as a matter of law*, a fact directly opposed by all of the evidence and facts adduced during the trial of the case. The contingent nature of the refusal to deal is shown by the facts stated in the opinion of the appellate court in *Frey & Son.* In *Frankfort* this is made abundantly clear in a subsequent case brought by the same plaintiff and heard and decided by the same Court in *Connecticut Importing Co. v. Continental D. Corporation*, 120 F. 2d 651 (*cert. den.* 317 U. S. 664, 63 S. Ct. 65, 87 L. Ed. 533). The facts in both *Frankfort* and *Continental* were held to be substantially similar insofar as they related to the question of conspiracy only, the name of the defendant was changed. However, the Court made a sharp distinction between the two cases insofar as the nature of damages was concerned. In *Continental* the facts on damage were practically on all fours with those in the case at bar and were stated by the court to be (p. 652):

> "Brabuski said: 'You are cut off because you didn't abide by the policy of our company, and that is the decision made between all of us.' * * * When Brochin asked if there was any chance to be reinstated Grabuski told him that there was no chance, that no distributor would buy of Continental if it reinstated the plaintiff and that he was not going to lose five distributors because of Brochin."

Plaintiffs in *Continental* were informed (p. 653) "that you gentlemen are to be definitely discontinued as our distributors."

In the instant proceeding a portion only of the undisputed evidence shows with respect to the termination here that Flintkote officials stated to the petitioners: "That they (Flintkote) were sorry, but from this time on they were unable to supply us (plaintiffs) with Flintkote tile." [R. 487.] That Mr. Harkins (the Flintkote official having direct responsibility for the termination) "decided that these plaintiffs could not be trusted to keep their word and that he felt they should be terminated as a Flintkote account." "Mr. Thompson explained to them (plaintiffs) that it had been decided that they could no longer supply them with tile. * * *" [R. 776.] That Mr. Harkins "saw no other course of action than to terminate them as soon as possible." [R. 809.] That Mr. Harkins ordered Thompson, Baymiller, and Ragland "to go over to the aabeta office in Bell, California, and terminate," and at that time Mr. Thompson told both the plaintiffs that "We were going to have to terminate our association with them." [R. 810.] That "Mr. Thompson was the spokesman for our group * * *" and that "It would be necessary for us to cease selling them merchandise." [R. 953.] That plaintiff asked "Do you really mean that we are no longer a Flintkote customer, that we can no longer buy?" and that Mr. Thompson answered "That is correct." [R. 954.] That "Mr. Harkins instructed the three of you (Thompson, Baymiller and Ragland) to go out to the Bell address and notify these people they could no longer buy Flintkote tile." [R. 995.] That "Thompson immediately said that Flintkote Co. could no longer sell them (plaintiffs) acoustical tile." [R. 995.] That the decision to terminate was made by the Flintkote officials, Harkins, Thompson, Baymiller, and Ragland, and that Harkins decided "that the understanding must be terminated, and

we agreed with that decision." That "We didn't waste any time. I (Thompson) told the plaintiffs that * * * we could no longer go along with a program of that kind, that we felt we must terminate any arrangement that we had with them at once." [R. 969.] That Harkins had the determination of the decision in his hands and that he fixed Flintkote's policy. [R. 1057.] That Harkins told Thompson and Baymiller that "You and Mr. Thompson will take that responsibility and tell the people we no longer consider them as approved acoustical tile contractors." [R. 1057.] That Harkins told these three Flintkote officials "to go cancel the agreement." That "We were going to remove them from the list of acoustical contractors and cease to sell them. * * * and I (Harkins) said to Mr. Thompson 'this is your job, you handle it.'" [R. 1096.] Finally, it is clear (Pet. pp. 3-6, App. B) that there was evidence from which the jury could have found that Flintkote likewise was threatened with the loss of customers.

The obvious conflict between the ruling in the instant case and the decisions cited in its support is further illustrated by the admissions of counsel in Flintkote's Opening Brief in the Court below, page 95:

> "The uncontradicted testimony is that the decision to cut off the plaintiffs was made by Harkins and his testimony is that his motive *was to dispose of a contractor he could not trust.* [R. 1071.] How can Flintkote's motive be any different from Harkins'? "Besides every other Flintkote representative who had anything to do with the cutoff testified to the same effect. [Ragland, R. 810, Baymiller, R. 953, Thompson, R. 1036, and Lewis, R. 1047.]". (Emphasis supplied.)

The Circuit Court of Appeals for the Second Circuit in distinguishing the *Continental* case from its prior decision in the *Frankfort* case stated (pp. 653-654):

> "We recently upheld a judgment awarding damages to the present plaintiff against different defendants under facts closely resembling those now before us. *Connecticut Importing Company v. Frankfort Distilleries*, 2 Cir., 101 F. 2d 79. *The present situation is not one where Continental indicated that it would not sell to plaintiff in the future if the latter did not observe its price schedule, but one where there was proof of an agreement among the defendants to maintain the schedules and of a conspiracy on their part to exclude plaintiff as a distributor because it failed to keep its bargain.* * * *
>
> *"Appellants argue that the court erred in allowing the jury to award damages up to the time of bringing this action or for so long as the plaintiff remained in business.* * * * *The wrong the plaintiff suffered occurred when it was excluded as a distributor. Any continuance of the conspiracy beyond that period could have no effect on its right to damages after Continental had once terminated its agency with the joint action of the other defendants."* (Italics added.)

It will thus be seen that the trial judge gave a broader latitude to the measure of continued loss of profits than in the instant case since here the court limited the jury in this respect to the date of trial at which date speculation as to plaintiffs "remaining in business" and being able and willing through their joint efforts to sell and install Flintkote acoustical tile as they had been able to do prior to the termination date was not in dispute.

The Court in *Continental* further held that:

> "The defendants tortiously caused the plaintiff to lose its right to act as a distributor of Continental.

"If it had been allowed to continue in that relation it could, after August 17, 1937, have been prevented by Continental from price-cutting. It is quite problematical what effect such prevention would have had upon its net earnings. The question of whether it would have affected its prior scale of profits was left by Judge Clark to the jury. That was the most favorable action the defendants could ask for. Perhaps, as Grabuski said, cessation of price-cutting would have resulted in better earnings. The verdict for less than the amount of earnings estimated on the former scale probably indicated that the jury thought higher prices would have resulted in less profits and also they may have regarded a scale of anticipated earnings based on those of the autumn of 1936 as subject to some discount. Prior to plaintiff's exclusion as a distributor, it had made money from buying and selling the Continental brands. The defendants were wrongdoers and, it seems to us, had the burden of proving that the plaintiff, whom they had driven out of business would not have realized the profits it once enjoyed if it had had to charge higher prices to its customers."

Finally it is again noted that the validity of Flintkote's excuse for its termination of petitioners' source of supply was presented as an issue in the case, and repudiated by the verdict of the jury in holding that the termination was the result solely of a conspiracy between Flintkote and petitioners' competitors for the purpose of eliminating petitioners' competition in the field. Petitioners upon notification of the termination of their supply of Flintkote tile could not thereafter for any purpose or under any circumstances purchase acoustical tile from Flintkote. [R. 239, 240, 257, 258, 847, 953, 954-955, 993, 995, 999, 1057, 1071, 1072, 1096-1097; Pet. pp. 11-18, App. D.]

The Circuit Court of Appeals' characterization of the termination act of Flintkote here as being a series of refusals *as a matter of law* was obviously for the purpose of attempting to bring the facts here within the holdings in certain motion picture cases. Those cases involve not a *refusal to license* film, but only a limited refusal to supply film on a particular run or availability as each picture was in fact sold or licensed to a particular exhibitor. The damage in such a situation obviously results from the delayed exhibition of each picture as each picture was from time to time purchased or licensed by the exhibitor.

In its Brief (Opp. p. 9) respondent apparently seeks to distinguish or in some manner argue that the Circuit Court of Appeals did not attack petitioners' qualifications to testify as to the amount of damages suffered by reason of lost profits, but rather "held merely that, even considering that testimony, there was not sufficient evidence to sustain the verdict." A clear admission that the Court based its decision on the weight and reevaluation of the evidence. Whether we accept respondent's position on this point, the Circuit Court of Appeals' ruling is nonetheless erroneous and in direct conflict with the law both in the Ninth Circuit and in other Federal Circuits and with the decisions of the Supreme Court of the United States (Pet. pp. 11-18, 26-28). To the same effect see:

(1) In *Sacramento Suburban Fruit Lands Co. v. La Gue* (C. C. A. 9th), 40 F. 2d 897, the Ninth Circuit after holding that improper evidence had been admitted stated:

> "In testifying as to value, we are inclined to think the witness Kerr, called by the plaintiffs, employed an improper and inadequate standard, but, considering the specific ground upon which defendant's motion to strike out the testimony as a whole was based, we cannot say that its denial constituted error. The fact that the witness did not have direct knowledge of the

land or of the enterprise at the time of the sale affects the weight rather than the competency of his testimony. *Montana Railway Co. v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 34 L. Ed. 681."

Compare the foregoing with the same Court's ruling in the instant case where neither petitioners' qualifications nor the demonstrative evidence upon which their opinions were based were the subject of objection or were otherwise challenged, and where respondent's own evidence affirmed the qualifications of petitioners and failed to challenge the demonstrative evidence upon which petitioners' opinions were based and which substantiated said opinions as to lost profits.

In *Troutman v. United States* (C. C. A. 10th, 1938), the Court stated:

"The question of the qualifications of a witness to testify as an expert rests largely in the sound discretion of the trial court, and the exercise of that discretion will not be lightly disturbed on appeal. A clear showing of abuse of discretion is required. *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 S. Ct. 731, 36 L. Ed. 510; *Gila Valley R. R. Co. v. Lyon*, 203 U. S. 465, 27 S. Ct. 145, 51 L. Ed. 276; *Clarke v. Hot Springs Electric Light & Power Co.*, 10 Cir., 55 F. 2d 612; *General Paint Corporation v. Kramer*, 10 Cir., 68 F. 2d 40; *American Glycerin Co. v. Eason Oil Co.*, 10 Cir., 98 F. 2d 479."

There was, of course, no "abuse of discretion" charged or found here. There is only the substitution of the opinion of the Ninth Circuit Court of Appeals for the finding of the jury on the weight to be accorded petitioners' opinions as to lost profits and the utter ignoring by said Court of the substantial demonstrative evidence in the record upon which petitioners' opinion was admittedly based.

In *Schillie v. Atchison, Topeka & Santa Fe Railway Co.* (C. C. A. 8th), 222 F. 2d 810, the same basic principle is clearly expounded:

> "* * * Expert testimony is appropriate and proper when the subject is one which a person of normal experience and qualification—a juror—would not be able to decide without the technical assistance of one having unusual knowledge of the subject by reason of skill, experience or education in that particular field. * * * The determination of its admissibility is largely within the discretion of the trial court under the peculiar circumstances of each case. * * * We would have reached a different conclusion, but the area of discretion on the part of the trial judge is such that the cause would not be reversed for that reason. *Cf. Henwood v. Chaney*, 8 Cir., 156 F. 2d 392." (The foregoing would seem to be especially applicable where the qualifications of the experts were not challenged and were in fact confirmed by defense witnesses.)

The Federal Appellate Courts and this Court has uniformly upheld jury verdicts as to the amount of damage in tort cases on less or comparable evidence as was before the jury in the instant proceeding: *Twentieth Century-Fox Film Corporation, et al. v. Brookside Theatre Corporation*, 194 F. 2d 846, 854-855; *Peninsylvania Sugar R. Co. v. American Sugar R. Co.*, 166 Fed. 254, 260; *Aladdin Mfg. Co. v. Mantle Lamp Co. of America*, 116 F. 2d 708, 716-717; *Allison v. Chandler*, 11 Mich. 542; *Chapman v. Kirby*, 49 Ill. 221 cited and approved in *Heiman v. de Palma*, 232 U. S. 571.

In *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359, the Supreme Court adopted the language of the Court of Appeals as a correct statement of applicable rules of law:

> "We conclude that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference." (P. 379.)

It has been pointed out that the jury was so instructed in the instant proceeding, and that this instruction was approved by both counsel. See to the same effect *Frey & Son v. Welch Grape Juice Co.*, 240 Fed. 114, 117; *Speegle v. Board of Fire Underwriters*, 29 Cal. 34, 46, citing *Bigelow v. RKO Radio Pictures, Inc., et al.*, 327 U. S. 251.

In *Bordonaro Bros. Theatre v. Paramount Pictures, et al.*, 176 F. 2d 594, the Court held in a motion picture case that:

> "Damages in such a situation necessarily cannot be asserted with mathematical precision; but the testimony of plaintiff's expert witness, Samuelson, 'while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted.' *William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada*, 2 Cir., 42 F. 2d 152, 155, certiorari denied *Associated Bill Posters of U. S. and Canada v. William H. Rankin Co.*, 282 U. S. 864, 51 S. Ct. 37, 75 L. Ed. 765. Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy."

Here the only comparable experts in the field were hostile defendants [R. 980-981]; none of whom were

examined to rebut the damage evidence when called by respondent.

Again, in the recent case of *Kobe, Inc. v. Dempsey Pump Co., et al.*, 198 F. 2d 416, cert. den. 73 S. Ct. 46, the Court followed the uniform doctrine with respect to measurement of damages in tort actions.

> "* * * *To sustain the amount of the damage, Dempsey and Specialty produced all the evidence available under the circumstances. They showed that they had the facilities, the personnel and the finances to manufacture and market the Dempsey products.* * * * One expert with long experience in the field in marketing hydraulic pumps and who knew the Dempsey pump and its performance as compared *with others, testified that in his opinion Dempsey would have sold considerably more pumps and auxiliary equipment than that allowed by the court had there been no interference on the part of Kobe. These experts believed that the growth curve of the Dempsey product would have continued upward over the period in question principally because of the pump's performance and its price.*" (Emphasis added.)

In *Chapman v. Kirby*, 49 Ill. 211, cited with approval and followed in *Veinman v. de Palma*, 232 U. S. 571, 34 S. Ct. 370, 58 L. Ed. 733, plaintiff's business, conducted on leased premises, was interrupted by wrongful act. Chapman, confronted with the inability to operate, *sold* his plant and *closed* out his business and sued to recover his damage, claiming that such damage consisted of the profits he would have earned except for the interruption and destruction of his business. His contention was sustained. The record is clear that petitioners' opinion was substantially supported by other evidence properly admitted without objection and was considered by the jury. See also to the same effect *Bolan v. Lehigh Valley R. Co.* (C. C. A. 2, 1948), 167 F. 2d 934; *Firemen's Fund In-*

surance Co. v. Collins (5th C. C. A., 1955), 220 F. 2d 150; *Union Trust Co. of Cleveland, Ohio, et al., v. Woodrow Mfg. Co., et al.* (8th C. C. A.), 2 Fed. Supp. 602.

Conclusion.

It is respectfully submitted that this, the Supreme Court of the United States, in the exercise of its supervisory power over Federal Appellate Courts has not hesitated in the past to grant certiorari for any one or more of the following reasons.

1. Where, as here, there are substantial clearcut issues of law, which are fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, despite the interlocutory status of the present decision. *U. S. v. General Motors*, 325 U. S. 373, 65 S. Ct. 357 (Pet. p. 21-22).

2. To bring uniformity of decisions within the circuit where, as here, the Circuit Court of Appeals seems to apply a different standard with respect to law and procedure in treble damage actions than in other types of cases involving the same principles.

3. Where erroneous holdings of law and procedure in the decision of the Appellate Court is important in the administration and future enforcement of the statute involved; or will constitute a hinderance to effective administration of the law. *Kiefer-Stewart v. Joseph E. Seagram & Son*, 340 U. S. 211, 71 S. Ct. 259.

4. Because an indifferent or unfriendly attitude had permeated the decision of the lower Court with a philosophy hostile to that reflected in the legislation and the public policy of the act.

5. Where the decision of the lower Court is in conflict with the ruling of other Circuit Courts of Appeal or with the Supreme Court of the United States as it respects rulings and applications of substantive and procedural law, and

6. In decisions which might involve or affect public policy or the administration of a Federal statute as a result of clear error in the decision itself.

It is respectfully submitted that all of the foregoing premises are involved in the instant proceeding, and that the end result of the Ninth Circuit Court's Opinion requires and invites either (1) continuous and repeated litigation in the instant case premised upon the assumption of continued and repeated refusals to sell: (2) in cases where a conspiracy such as the one here is entirely successful a plaintiff would be deprived of all damage due to lost profits by limiting recovery to those damages, if any, which might be shown to have accrued between the notice of termination and the time (whether a day, week, or month) that it might take plaintiff to cease operating, and (3) with respect to the effect of the decision on the question of conspiracy and instructions of the Court amounts to an assertion of the right of the Appellate Court to grant a trial *de novo* based upon its own impression of the weight of isolated portions of the evidence or instructions and the utter ignoring or minimizing of additional and cumulative evidence and instructions presented to and considered by the jury.

It is respectfully submitted that the Petition for Certiorari should be granted.

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